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No. 98-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

vs.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* SOUTH CAROLINA CHAMBER OF COMMERCE, ENVIRONMENTAL MANAGEMENT ASSOCIATION OF SOUTH CAROLINA AND SOUTH CAROLINA MANUFACTURERS ALLIANCE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Petitioners lack standing under Article III of the United States Constitution because the only potential relief available to redress their claimed injuries is the civil penalty assessed against Laidlaw and payable to the United States Treasury.

2. Whether Petitioners' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a prevailing or substantially prevailing party under 33 U.S.C.A. § 1365(d) (West Supp. 1998).

3. Whether the citizen suit should have been barred even if the Fourth Circuit had concluded that Petitioners had standing because DHEC had diligently prosecuted Laidlaw.

PARTIES TO THE PROCEEDING

Respondent did not agree that Citizens Local Environmental Action Network, Inc. ("CLEAN") and Sierra Club should be parties in this action. CLEAN and Sierra Club never filed 60-day notice letters and, therefore, should not be parties. 33 U.S.C.A. § 1365(b) (1986).

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INTEREST OF *AMICI CURIAE*[1]

The South Carolina Chamber of Commerce ("Chamber") is comprised of regulated businesses and industries from across the State of South Carolina. The Chamber actively participates in the administrative, regulatory and legislative issues affecting industry in South Carolina. Through its Environmental and Technology Committee, the Chamber comments frequently on environmental policies, guidelines, regulations, and legislative measures that would directly affect the operations of its membership. As such, the Chamber is keenly interested in this appeal and the effect this Court's decision will have on its membership.

The Environmental Management Association of South Carolina ("EMA") is a group of environmental professionals from South Carolina industry that promotes responsible waste management practices to protect the environment. The EMA serves communities and businesses by advising and safeguarding members' and the public's interests through regulatory and legislative incentives, public relations, and educational programs. EMA members have a direct interest in the development of laws under which they are regulated, such as the Federal Water Pollution Control Act, and they are directly affected by these administrative agency regulations and procedures.

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1. Pursuant to Sup. Ct. R. 37.6, Laidlaw Environmental Services, Inc., now known as Safety-Kleen Corp., parent corporation of Respondent, is a member of the South Carolina Chamber of Commerce and the Environmental Management Association of South Carolina and has made a monetary contribution to the preparation and submission of this brief. Deborah Ann Hottel, Counsel for the South Carolina Chamber of Commerce and the South Carolina Manufacturers Alliance, and Virginia Ann Mullikin, Counsel for the Environmental Management Association of South Carolina, are the sole authors of this brief. Letters of consent have been filed with the Clerk of the Court.

The South Carolina Manufacturers Alliance ("SCMA") is a trade association representing South Carolina manufacturers. The primary function of the SCMA is to serve as the manufacturing industry's government liaison. SCMA maintains constant communication with state government agencies on issues of interest to its members. SCMA currently has nine standing committees, including the Environmental Committee, and four divisions. Its 77 member organizations represent over 80,000 employees statewide.

The Chamber, the EMA and the SCMA ("Amici Curiae") recognize the value of citizen suits as an important component of enforcement of the Federal Water Pollution Control Act and believe that they can provide a strong incentive for regulated entities to comply with the Act in furtherance of the Act's principal objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251(a) (1986 and West Supp. 1998). The Amici Curiae, however, oppose a judicial broadening of the Congressional circumscription of these laws which the Petitioners urge. Thus, on behalf of their members, the Amici Curiae submit this joint brief to express the views of their regulated members in support of Respondent Laidlaw Environmental Services (TOC), Inc., now known as Safety-Kleen Roebuck, Inc.

INTRODUCTION

Amici Curiae South Carolina Chamber of Commerce, Environmental Management Association of South Carolina, and South Carolina Manufacturers Alliance respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Fourth Circuit's opinion in this case. That opinion is reported at 149 F.3d 303 (CA4 1998).

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATUTORY BACKGROUND

The Petition for Writ of Certiorari accurately sets out the opinions below, the grounds for jurisdiction, the statutes involved and the statutory background.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case as set forth in the Brief in Opposition of the Respondent.

REASONS FOR DENYING THE PETITION

I.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT PROPERLY HELD THAT THE PETITIONERS LACK STANDING UNDER ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES.

(Petitioners' Arguments 1, 2, 3, 4, 5 and 6).

In order to have standing, the Petitioners must meet three elements: (1) the Petitioners must have suffered an actual or threatened injury in fact; (2) the injury must have been caused by Laidlaw's conduct; and (3) the injury must be redressable by the relief sought. *Friends of the Earth*, 149 F.3d 303, 306 (CA4 1998). These elements must continue to exist at every stage of review, not merely at the time of filing. Otherwise, the action becomes moot. *Id.*

The Fourth Circuit reasoned that since the Petitioners did not appeal the denial of declaratory and injunctive relief, the *only* relief available was the civil penalty imposed on Laidlaw which would be paid to the United States Treasury. Relying on

Steel Co. v. Citizens For A Better Env't, 523 U.S. 83, 118 S. Ct. 1003 (1998), the Fourth Circuit held that civil penalties payable to the government could not redress any injury the Petitioners may have suffered. Hence, the Fourth Circuit properly vacated the order of the district court and remanded with instructions to dismiss the action.

The Petitioners raise as a reason for granting the Petition that the Fourth Circuit's opinion is directly inconsistent with this Court's opinion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376 (1987). Petition for Writ at 8 and 13.

Steel Co. simply held that Article III jurisdiction is always the antecedent question, as Justice O'Connor and Justice Kennedy recognized. In his concurring opinion, Justice Stevens took issue with this statement. As stated in his concurrence, Justice Stevens believes the *Steel Co.* case presents two questions: (1) whether EPCRA confers federal jurisdiction over citizen suits for wholly past violations; and (2), if so, whether respondent has standing under Article III.

Justice Stevens opined that the Court elected to decide the constitutional question first and, in doing so, "has created new constitutional law." *Steel Co.*, 523 U.S. at __, 188 S. Ct. at 1021. Justice Stevens's argument revolves around the question of which issue to decide first. For him, the choice in *Steel Co.* is between two jurisdictional issues, and the Court has routinely held that, when presented with two jurisdictional issues, the Court may choose which one to answer first. In the *Steel Co.* decision, Justice Stevens stated it would have been "prudent to answer the question of statutory construction before announcing new constitutional doctrine" as was the case in *Gwaltney*. The decision in *Gwaltney* stands for the proposition that the Court clearly has the power to decide the statutory question first. *Steel*

Co., 52[illegible] U.S. at __, 118 S. Ct. at 1025. Therein lies the problem with the Petitioners' argument in this case.

In their Petition for Writ, the Petitioners repeatedly state that the issue here is not standing as in *Steel Co.*, but mootness as in *Gwaltney*. See Petition for Writ at 11 and 13. However, as the Fourth Circuit aptly stated recently in *Woodlands Ltd. v. Nationsbank, N.A.*, No. 97-1813, 1998 U.S. App. LEXIS 23716 (CA4 Sept. 23, 1998), the doctrine of standing often implicates that of mootness; the three standing elements must exist throughout the pendency of the litigation. Otherwise, the case becomes moot. What Justice Stevens pointed out in his concurrence is that the *Steel Co.* decision has effectively eliminated the opportunity to choose which jurisdictional issue to address first. In *Gwaltney*, the Court addressed the statutory issues first of whether the statute conferred jurisdiction over citizen suits for wholly past violations and whether the allegation of on-going injury sufficed to support jurisdiction. As Justice Stevens states, the fact that the Court did not address standing in *Gwaltney* does not establish that the plaintiffs had standing there. *Steel Co.*, 523 U.S. at __, 118 S. Ct. at 1025. It stands simply for the proposition that regardless of how the Court characterized the issue in *Gwaltney*, the Court had the power to address the statutory issue first, and did. *Steel Co.*, 523 U.S. at __, 118 S. Ct. at 1025.

In *Steel Co.*, the Court said that the Article III standing issue *must* be addressed first.[2] As Justice Stevens states,

2. The Third and Fourth Circuits have adopted the Steel Co. holding by deciding the Article III standing issue first. *See Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, No. 98-5136, 1998 U.S. App. LEXIS 32595 (CA3 Dec. 30, 1998) (question of Article III standing should be addressed before issues of prudential and statutory standing); *Schurr v. Resorts Int'l Hotel*, 16 F. Supp. 2d 537 (D.N.J. 1998) (federal courts must first (Cont'd)

"[w]hether correct or incorrect, the Court's constitutional holding represents a significant extension of prior case law." 523 U.S. at __, 118 S. Ct. at 1027. This case is a "significant new development in our constitutional jurisprudence." 523 U.S. at __, 118 S. Ct. 1030. The Petitioners herein propose that the Court ignore this new development and continue to decide statutory issues before Article III issues, as was done in *Gwaltney*. That choice no longer exists. When Article III standing ceases to exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. 83, __, 118 S. Ct. 1003, 1012.

The Petitioners did not appeal the denial of declaratory and injunctive relief and have as their only relief the civil penalty imposed upon Laidlaw to be paid to the United States Treasury. As Justice Stevens pointed out, although the Court in *Steel Co.* failed to specify why payment to the Respondent would redress Respondent's injuries and why payment to the United States Treasury does not, *Steel Co.* holds that payment of the civil penalty is the only proper relief, and thus, the Fourth Circuit's reliance upon this holding is proper. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." 523 U.S. at __, 118 S. Ct. at 1019. A generalized interest in deterrence is insufficient for purposes of Article III. 523 U.S. at __, 118 S. Ct. at 1019.

We agree with the Respondent that Laidlaw was not brought into compliance in response to litigation. The Petitioners' assertion to the contrary is not accurate. Petitioners

(Cont'd)
squarely address the question of subject matter jurisdiction); *Mixer v. M.K.-Ferguson Co.*, No. 6:98-0326, 1998 U.S. Dist. LEXIS 12801 (W.D.W.V. Aug. 12, 1998) (this term the Supreme Court invalidated the practice of addressing questions on the merits without addressing jurisdictional questions first).

also argue that there is no evidence that makes it absolutely clear that Laidlaw's allegedly wrongful behavior could not be reasonably expected to recur. Petition for Writ at 19. Again, this statement is not accurate. The facility has been in closure since August 1998 pursuant to a consent order entered into with DHEC. As stated by this Court in *Steel Co.*, "[i]t is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based." 523 U.S. at __, 118 S. Ct. at 1020.

II.

THE FOURTH CIRCUIT PROPERLY DENIED THE PETITIONERS THE RECOVERY OF ATTORNEYS' FEES AND OTHER COSTS.

(Petitioners' Arguments 7 and 8).

In a footnote, the Fourth Circuit ruled that the failure of FOE, *et al.* to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available to only a "prevailing party or substantially prevailing party. 33 U.S.C.A. § 1365(d) (West Supp. 1998)." *Friends of the Earth*, 149 F.3d at 307 n.5.

In response, the Petitioners submit a lengthy argument that the Fourth Circuit decision is "of devastating consequence to citizen suits under the Clean Water Act and other environmental statutes," "is almost certain to lead environmental groups to cease bringing citizen suits," and "will affect the willingness of lawyers to bring not only citizen suits under environmental statutes but suits under civil rights statutes and other statutes where Congress has provided for fee-shifting." Petition for Writ at 26, 27 and 29.

These statements are without merit. If anything, the decision will cause plaintiffs to avoid pursuing citizen suits in instances where the violation has resulted in no harm to the environment and the state has "diligently prosecuted" the violation. Members of the bar should properly evaluate the case before them to determine if the state has "diligently prosecuted" and, if so, refrain from incurring millions of dollars in attorneys' fees at the expense of their citizen-plaintiffs pursuing a case that should not be brought in the first instance. This holding by no means should discourage plaintiffs from properly bringing citizen suits in those instances where diligent prosecution has not occurred — the sole purpose of the citizen-suit provision of the Federal Water Pollution Control Act. The Fourth Circuit indirectly has held true to the dictates of 33 U.S.C.A. § 1365(b)(1)(B) and correctly applied the holding in *Steel Co.* Indeed, an interest in attorneys' fees is insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim. 523 U.S. at __, 118 S. Ct. at 1019.

Having reviewed the Petitioners' argument and underlying authorities, the Amici Curiae in accordance with Sup. Ct. R. 37.1 can bring to the attention of this Court no further relevant material not already brought to the attention of this Court by the Respondent in its Brief in Opposition. Therefore, Amici Curiae support in its entirety the argument made by the Respondent.

III.

THE DISTRICT COURT ERRED IN FAILING TO BAR THE CITIZEN SUIT DUE TO DILIGENT PROSECUTION BY DHEC.

FOE, *et al.*, appealed the order of the district court arguing that the district court abused its discretion by imposing an inadequate penalty. Laidlaw cross appealed claiming that FOE,

et al. lacked standing to institute this action because they suffered no injury in fact and that

> this suit should have been barred because the South Carolina Department of Health and Environmental Control (DHEC) diligently prosecuted a prior action regarding the same violations. See 33 U.S.C.A. § 1365(b)(1)(B).

Friends of the Earth, 149 F.3d 303, 305 (CA4 1998).[3] Although the Fourth Circuit concluded that the action was moot for lack of standing and, therefore, did not address the diligent prosecution issue in its decision, the Amici Curiae remain concerned about the district court's conclusion. Even if the Fourth Circuit had concluded that the Petitioners had standing, the district court erred in failing to bar the citizen suit and in ruling that DHEC had not diligently prosecuted Laidlaw within the meaning of Section 1365(b)(1)(B) for the following reasons.

This Court has recognized that agencies administering the Federal Water Pollution Control Act are to be given significant discretion and has outlined the role of citizen suits.

> The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement

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3. Section 1365(b)(1)(B) provides that a citizen suit under the Federal Water Pollution Control Act may not be commenced when the "State has commenced and is diligently prosecuting a civil . . . action in a court of the . . . State to require compliance." 33 U.S.C.A. § 1365(b)(1)(B) (1986).

> actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies *fail to exercise* their enforcement responsibility."

Gwaltney, 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987) (quoting S. Rep. No. 92-414, p. 64 (1971) reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1973) (emphasis added)). The 1987 amendments to the Federal Water Pollution Control Act reflect a shift of enforcement emphasis to the state agencies. *Connecticut Coastal Fishermen's Association v. Remington Arms Co.*, 777 F. Supp. 173, 177 (D. Conn. 1991) (citing Frank P. Grad, *Treatise on Environmental Law*, 3-303). States are afforded some latitude in selecting the specific mechanisms of their enforcement program in that the state agency must be given great deference to proceed in a manner it considers in the best interests of all the parties involved. *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (CA8 1994), *cert. denied*, 513 U.S. 1147, 115 S. Ct. 1094 (1995). Citizen suits are to "ignite agency enforcement" and to act as an "*alternative* enforcement mechanism *absent* agency enforcement." *Connecticut Fund for Env't v. Upjohn Co.*, 660 F. Supp. 1397, 1403 (D. Conn. 1987) (emphasis added). Thus, unless the state has failed or declined to take action, a citizen suit is not authorized. *USEPA v. City of Green Forest*, 921 F.2d 1394, 1405 (CA8 1990); *see North and South Rivers Watershed Assn. v. Scituate*, 949 F.2d 552, 557 (CA1 1991); *see also Remington Arms*, 777 F. Supp. at 179.

An analysis of whether or not "diligent prosecution" has taken place does not encompass *de novo* assessment of whether the agency's procedure in seeking enforcement and computing sanctions conforms to those that the citizen group or the court

wishes to impose. *See Gwaltney*, 484 U.S. 49, 61, 108 S. Ct. 376, 383 (1987); *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 933 F.2d 124, 127 (CA2 1991).

In order to overcome the presumption of DHEC's diligent prosecution, the Petitioners were required to show that the actions by DHEC amounted to inaction. *See Gwaltney*, 484 U.S. at 60, 108 S. Ct. at 383; *see also Scituate*, 949 F.2d at 555.

In this case, Laidlaw paid a substantial penalty, expended over a million dollars in upgrading its system, and complied with its NPDES permit as a result of DHEC's enforcement action. A citizen suit to visit the identical issues, absent fraud or collusion, is inappropriate.[4] *Scituate*, 949 F.2d at 556.

Moreover, the First Circuit has held that diligent prosecution by a state agency does *not* require assessing any penalty at all. In *Scituate*, the First Circuit rejected the plaintiff's argument that for the state agency's action to be considered "diligently prosecuted" a penalty must be assessed. Such an interpretation would enable citizen suits to expand the "*supplemental*" role envisioned for citizen suits and create a potentially intrusive role for citizens. *Scituate*, 949 F.2d at 556, 558 (citing *Gwaltney*). "Diligence" is the act of remedying the violations. *Scituate*, 949 F.2d at 558. The mere fact that the state does not take the precise action plaintiffs desire does not constitute lack of diligence. *Id.* at 558.

The district court in the instant case essentially substituted its judgment for that of DHEC in determining what the penalty should be, thereby allowing the citizen suit to *supplant* rather than *supplement* the government action. DHEC's enforcement action brought Laidlaw into full compliance, assured that no

4. The district court found that the action between DHEC and Laidlaw was *not* the product of fraud or collusion. (JA 89).

harm to the environment occurred, and resulted in a substantial monetary penalty. The actions of DHEC were diligent in remedying the noncompliance and DHEC did not fail " 'to exercise [its] enforcement responsibility.' " *Gwaltney*, 484 U.S. at 60, 108 S. Ct. 383.

A citizen suit may not be brought merely to obtain penalties and attorneys' fees when the agency has already remedied the problem causing the violations.[5] *Id.*; *City of Green Forest*, 921 F.2d at 1405.

Citizens suing under the Federal Water Pollution Control Act are "private attorneys general"; thus, there is little left to be done after the government has negotiated an agreement. *City of Green Forest*, 921 F.2d at 1405. Penalties recoverable under the Act are payable to the United States Treasury and are not recovered by the aggrieved citizens. *Id.* While a citizen may be dissatisfied with an agency's ultimate resolution, the filing of a citizen suit due to dissatisfaction would impinge on the authority and autonomy of the federal and state agencies. *Remington Arms*, 776 F. Supp. at 179; *see generally Harmon Industries, Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998) (in case of first impression under Resource Conservation and Recovery Act, court held that EPA did not have the authority to impose its own separate penalties after an industry negotiates a consent decree with the authorized state agency and that settlement is approved by an appropriate state authority; were

5. The Second Circuit was faced with a similar issue in *Atlantic States Legal Foundation v. Eastman Kodak*, 933 F.2d 124 (CA2 1991). The Court held that a citizen suit cannot proceed when its actual purpose is to challenge the terms of a settlement reached by state officials where the settlement reasonably assures that the alleged violations have ceased and will not recur. This holding is based upon the fact that a citizen suit is to stop violations of the Federal Water Pollution Control Act and not to challenge the appropriate state and federal authorities. *Id.* at 127.

it otherwise, none of the state's powers would ever have the same force and effect because the EPA could modify, by piecemeal measures, any action taken by the states).

This Court has recognized that judicial involvement might ultimately discourage out of court settlements between agencies and regulated entities, since an incentive to settle would be diminished if subsequent citizen suits were allowed. *Gwaltney*, 484 U.S. at 60-61, 108 S. Ct. at 383. Given the history of the Federal Water Pollution Control Act, this could not have been the Congressional intent. *Id.*

By enacting the Water Pollution Control Act, Congress envisioned a partnership where states would assist in the protection of the Nation's waterways. *See Mianus River Preservation Comm. v. Envt'l Protection Agency*, 541 F.2d 899 (CA2 1976). South Carolina has dedicated vast resources, time and thoughtful study to implement these programs — programs upon which South Carolina industry has a right to rely.

Duplicative actions aimed at exacting financial penalties in the name of environmental protection do not further the goal of the Federal Water Pollution Control Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.A. § 1251(a) (1986).

If DHEC's discretionary penalty assessment procedure were not upheld as adequate, and, therefore, as diligent prosecution, the business community is concerned that virtually every DHEC enforcement action could be followed by a citizen suit alleging nondiligent prosecution on the part of the state, thereby changing the citizens' role from "interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61, 108 S. Ct. at 383. This concern is especially accurate in instances where a citizen group disagrees with the penalty set by the state. *See*

generally Harmon Industries, Inc., 19 F. Supp. 2d 988, 996 (1998) (RCRA gives EPA only the option of withdrawing authorization of a state program that fails to enforce the program, not the option to reject part of a program because EPA believes the penalty to be inadequate. "Certainly, such a schizophrenic approach to enforcement of RCRA would result in uncertainty in the public mind.").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of Friends of the Earth, *et al.* should be denied.

Respectfully submitted,

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